FILE COPY

FILED
FEB 20 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 716

R. E. PECKHAM, Assignee and Trustee,
Petitioner,

vs.

JOSE E. CASALDUC, Trustee of Ronrico Corporation in Reorganization,
RONRICO CORPORATION, Debtor,
FERD S. MEYER, Individually and as Trustee; and
PUERTO RICO DISTILLING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit.

(Opinions below are Appended Hereto)

JAY E. DARLINGTON,
306 Hammond Building,
Hammond, Indiana,
Attorney for Petitioner.

TABLE OF CONTENTS OF PETITION.

	PAGE
Opinions below	2
Grounds for invoking this Court's jurisdiction	2
Questions presented for review	2
Statement of the case	3
Argument—Grounds for issuance of writ	9
Summary	9
Elaboration	12
Conclusion	24

APPENDIX OF THIS PETITION.

District Court's opinion	1a
Court of Appeals' opinion	14a

TABLE OF CASES.

Albin v. Corning, etc. Co. (1942) 317 U.S. 211, 212, 63 S. Ct. 170, 171 19

Boykin v. Huff (C.A. D.C. 1941) 121 F.2d 865, 872 23

Chessman v. Teets (1955) 350 U.S. 3, 76 S.Ct. 34 24

Davis v. F. W. Woolworth Co. (10 Cir. 1931) 54 F.2d 366 21

Dept. of Public Works v. Rockwell Cemetery Assn. (1924) 312 Ill. 232, 143 N.E. 875, 877 21

Horowitz v. Kaplan (1 Cir. 1951) 193 F.2d 64 19

In re: Witherbee Court Corpn. (2 Cir. 1937) 88 F.2d 251, 254 20

John Hancock Mut. Life Ins. Co. v. Casey (1 Cir. 1944) 141 F.2d 104, 107 23

Peckham v. Casalduc, Trustee (C.A. 1, 1958) 261 F.2d 120 2

PAGE

Peckham v. Ronrico Corpn. et al. (C.A. 1, 1948) 171 F.2d 653, 658 3

Peckham v. Ronrico Corpn. et al., (C.A. 1, 1954) 211 F.2d 727, 728-730 3

Securities & Exchange Comm. v. U. S. Realty & Improvement Co. (1940) 310 U.S. 434, 457-8, 60 S.Ct. 1044, 1954 22

Tennessee Pub. Co. v. American Nat. Bank (1936) 299 U.S. 22-23; 57 S.Ct. 85, 87 22

STATUTES.

11 U.S.C. 47 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

R. E. PECKHAM, Assignee and Trustee,

Petitioner,

vs.

JOSE E. CASALDUC, Trustee of Ronrico Corporation in Reorganization,
RONRICO CORPORATION, Debtor,
FERD S. MEYER, Individually and as Trustee; and
PUERTO RICO DISTILLING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the First Circuit.

(Opinions below are Appended Hereto)

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner respectfully petitions this Court to issue its writ of certiorari to said Court of Appeals, to require the latter to *entertain and review his appeal on the merits,* from the United States District Court for Puerto Rico, and shows:

Opinions Below.

The opinion of the United States District Court for Puerto Rico, as yet unreported, is set forth in the appendix of this Petition at pages 1a to 13a.

The opinion of the Court of Appeals, set forth in the appendix of this Petition at pages 14a to 16a, is reported in:

Peckham v. *Casalduc, Trustee of Ronrico Corpn., et al.*, (C.A. 1, 1958) 261 F. 2d 120.

Grounds for Invoking this Court's Jurisdiction.

The Court of Appeals rendered its opinion and judgment dismissing Petitioner's appeal to it, on November 21, 1958. (Appendix of this Petition, p. 14a).

This petition, filed 90 days thereafter, invokes this Court's general jurisdiction to review final judgments of the Courts of Appeals under 28 U.S.C. 1254 (1).

Question Presented for Review.

Not the merits of the appeal, but Petitioner's *right to appeal*, is the question here presented.

Petitioner appealed from the District Court's order approving and confirming an amended plan of reorganization of Ronrico Corporation under Chapter X. The Court of Appeals, on motion of appellee-respondent Puerto Rico Distilling Company, dismissed the appeal on the grounds that:

(1) Petitioner "does not have the right to be heard" in this reorganization proceeding because he does not occupy the status of a creditor of, or stockholder of, the debtor.

(2) Petitioner "never became a party" in the reorganization proceeding, because he allegedly failed to file a petition for leave to intervene.

Statement of the Case.

In addition to the opinions appended to this Petition, there is filed herewith the "Appellees' Record Appendix" as printed in the Court of Appeals.

Previous Creditor's Suit and Appeals by Respondent.

Before the present Chapter X proceeding was commenced, this Petitioner as plaintiff filed a judgment creditor's suit in the same District Court, *asserting an equitable lien* upon half of the *capital* stock of the debtor Ronrico Corporation which was allegedly held by respondent Meyer as trustee. The District Court rendered summary judgment against the plaintiff, from which he appealed, resulting in reversal with directions to the District Court to entertain and try the case:

> *Peckham* v. *Ronrico Corpn. et al.* (C.A. 1, 1948) 171 F. 2d 653, 658.

Thereafter, this Petitioner, as trustee holder of a different judgment, sought to intervene the latter judgment in said creditor's suit as an asserted *additional equitable lien* upon the same half of the capital stock of Ronrico Corporation. Upon being denied leave to intervene, he again appealed, resulting in reversal with directions to the District Court to permit the intervention as a matter of *right*:

> *Peckham* v. *Ronrico Corporation* (C.A. 1, 1954) 211 F. 2d 727, 728-730.

The latter opinion states:

> "It seems to us clearly to follow from these considerations that Peckham, both as plaintiff and as petitioner for intervention, is seeking to enforce

an *equitable lien* upon or *claim* to those *shares*." (Our italics). 211 F. 2d at page 730, bottom of 2nd column.

Following the latter reversal, the creditor's suit was tried, but *has not yet been decided by the District Court*. The trial and impending decision has lasted since February 1955 due to prolonged recesses.

This Chapter X Proceeding.

On April 6, 1956, while said trial of said creditor's suit of the Petitioner was in recess, said Ronrico Corporation filed a voluntary petition for reorganization under Chapter X.

"Appellees' Record Appendix" p. A1.

On January 23, 1958, while said trial of the trial recess creditor's suit was still in progress, the Trustee in the reorganization proceeding filed an Amended Plan of reorganization, which provided that all of said Meyer part of the debtor's capital stock, which was subject to the pending "equitable lien or claim" of this Plaintiff-Petitioner would be *sold* for a total of $244,000, *free and clear of all liens and claims*, against the stock, including Petitioner's, to said Puerto Rico Distilling Company, which was the only other stockholder of the debtor (and which later became the appellee which successfully moved in the Court of Appeals to dismiss the appeal in question). The Amended Plan included other peculiar provisions, such as placing Puerto Rico Distilling Company in a position to control the execution of the plan, having that concern pay the fees and costs of administration, etc.

"Appellees' Record Appendix" pp. 47, 49.

This Petitioner on February 23, 1958 filed written Objections to the Amended Plan, charging that the plan was *a perversion of the Chapter X* judicial machinery for the purpose of accomplishing a *violation of the Anti-Trust laws* of the United States and also of Puerto Rico, and a *violation of the Internal Revenue laws* of the United States; and that the plan was the result of *collusion* between the Meyer and Puerto Rico Distilling Company stockholders to avoid Petitioner's asserted liens and to accomplish the aforesaid unlawful objects.

"Appellees' Record Appendix" pp. A19 to A73.

The District Judge (not Referee or Special Master) on March 21, 1958 entered an order overruling Petitioner's said Objections *on the merits.*

"Appellees' Record Appendix" pp. A74 to A76.

This was followed on April 8, 1958 by the District Judge's order and opinion approving the Amended Plan. A large part of the opinion is devoted to a *decision of the merits* of Petitioner's said Objections.

"Appellees' Record Appendix" pp. A77 to A90.

Appendix of this Petition, p. 1a and particularly pp. 4a to 11a.

An order confirming the Amended Plan followed and this Petitioner appealed to the Court of Appeals from both the said approving and confirming orders. The two companion appeals raising identical questions were consolidated in the Court of Appeals.

Appendix of this Petition, p. 14a.

Motion of Puerto Rico Distilling Company to Dismiss Appeal.

The appeal was docketed in July 1958 and Petitioner was granted extensions of time for filing his Appellant's Brief. During this extended time, before his Brief was filed, appellee-respondent Puerto Rico Distilling Company (see above) filed its Motion to Dismiss the appeal, which, omitting formal parts, reads:

> "One R. E. Peckham (hereinafter called "Peckham) has purported to appeal from certain orders entered, and alleged to have been entered, by the United States District Court for the District of Puerto Rico in a proceeding entitled: "In the Matter of Ronrico Corporation, Debtor," Bankruptcy No. 2146.
>
> One of the orders, appealed from in No. 5389, was entered by the lower court on April 8, 1958, under the provisions of section 174 of the Bankruptcy Act, approving an Amended Plan of Reorganization of the debtor corporation for submission to creditors and stockholders.
>
> "The appeals in No. 5390 are stated by appellant to be 'from the District Court's orders entered herein on June 13, 1958, and each of them, including specifically the Order granting the Trustee's petition for classification of creditors, the Order granting Puerto Rico Distilling Company's petition to amend the Amended Plan, and the Order confirming said Plan as thus amended.
>
> "Peckham, the appellant, is neither a creditor nor a stockholder of the debtor Ronrico Corporation, but asserts his interest in the proceeding in the lower court as the plaintiff and intervenor in another proceeding now pending in the lower court under the title of "R. E. Peckham, Assignee for the Creditors of The Meyer-Kiser Bank, succeeding Thomas E.

Garvin, Receiver of the Meyer-Kiser Bank, Plaintiff vs. Ronrico Corporation et al., Defendants; R. E. Peckham, Trustee holder of Judgment assigned from liquidator of The Meyer-Kiser Bank of Miami, Interpenor vs. Ronrico Corporation et al., Defendants," Civil No. 4639 (hereinafter called the "Peckham Case"). This last-mentioned litigation has been twice before this court on purely procedural matters. The opinions of this court appear at 171 F. 2d 653, and 211 F. 2d 727.

"The moving party, Puerto Rico Distilling Company, is the principal creditor and principal stockholder of the debtor corporation.

"The grounds upon which Puerto Rico Distilling Company seek to dismiss the appeal in No. 5389 and the purported appeals in No. 5390 are as follows:

1. Appellant has no appealable interest in any order from which he purports to appeal.

2. Each of the appeals is a mere collateral attack upon prior orders of the lower court from which appellant was entitled to appeal, and which are now final and unappealable.

3. Appellant failed to become a party to the proceedings in the lower court, and has in consequence no right to appeal from any order entered by the lower court.

4. An order approving a plan of reorganization under section 174 of the Act is not an appealable order.

5. The appeals taken in No. 5390 were prematurely taken, and the appellate court is without jurisdiction to hear same.

As is permitted by Rule 26, a memorandum in support hereof accompanies this motion." (Our italics).

See certified original Record from Court of Appeals.

Petitioner filed answer to the above Motion, making substantially the contentions against dismissal hereinafter argued.

ARGUMENT—GROUNDS FOR ISSUANCE OF WRIT.

Summary.

I.

It clearly appears on the face of the District Court's opinion that the District Court did entertain this Petitioner's objections to the Amended Plan and did decide the merits of said objections against him.

That order and opinion of the District Court operates as *res adjudicata* against him upon the issue made by his objections.

The other parties to the proceeding, Appellees-Respondents, *took the benefit* of that adjudication, and *took no cross-appeal* contesting the propriety the District Court's action in thus entertaining and adjudging the merits of this Petitioner's objections.

Thereby Petitioner's *right to be heard on the merits* became the *law of the case,* binding the District Court, the parties and the Court of Appeals, right or wrong, before the appeal went up to the Court of Appeals.

For the District Court thus to hear him and decide against him on the merits, and then for the Court of Appeals to refuse him a review on the merits on the grounds that (1) he has no right to be heard on the merits and (2) he was not a party below is not only error but is a violation of fundamental principles. It is a travesty, violating the Fifth Amendment, among other things.

Note: If the above proposition I is well taken, it conclusively entitles this Petitioner to this Court's writ of certiorari to enforce his right of review.

If the above proposition I is not well taken, Petitioner is nevertheless entitled to certiorari to enforce his right of review, because:

II.

The Court of Appeals' opinion and judgment dismissing Petitioner's appeal is based on erroneous premises of fact and law, resulting in serious error and denial of his right of review in a manner plainly violating the Fifth Amendment.

A.

This Petitioner's asserted "equitable lien and claim" upon the Meyer part of the Debtor's capital stock constitutes an asserted *property* right in the stock, entitling him to be heard within the plain spirit of Chapter X and the Judicial Code, regardless of technical definitions of "stockholders".

The fact that this Petition is *entitled* to *assert* these two "equitable liens or claims" was established as *res adjudicata* between this Petitioner and these Respondents by the above cited decisions of this same Court of Appeals (*Peckham* v. *Ronrico Corpn., et al.*, 171 F.2d 653, 658, and 211 F.2d 727, 728-730) wherein all these Respondents were parties in person except Casalduc, Trustee of Ronrico Corporation, and Puerto Rico Distillery Company, stockholder of Ronrico Corporation, and these latter two are bound through Ronrico Corporation which was a party.

While not essential to Petitioner's right to be heard, the *importance* of the right in this instance is shown by the following undisputed facts on the face of the last cited two opinions of this Court of Appeals (171 F.2d 653 and 211 F.2d 727) and on the face of the District Court's opinion in this proceeding (Appendix of this Petition, p. 1a, *infra*) showing:

(1) The "lien and claim" asserted in this Petitioner's complaint in his said creditor's suit now amounts to about $1,700,000, and the "lien and claim" asserted in his inter-

vening claim in that suit amounts to about $300,000, principal and interest—whereas the total value of the Meyer part of the Debtor's capital stock subject to these liens is about $1,000,000 according to this Petitioner's objections in the District Court, and is only $244,000 "sale price" to Puerto Rico Distilling Company *free and clear* of both of Petitioner's asserted liens as fixed in the Amended Plan which his appeal challenges.

(2) This excess of Petitioner's asserted "liens and claims" against said stock, over the value of the stock, is the *basis of the adjudication* in said last cited appeal that his second lien and claim is *entitled* to be intervened in the creditor's suit as a matter of *right*,—not a matter of grace or discretion. (*Peckham* v. *Ronrico Corpn., et al.*, 211 F.2d 727).

B.

The contention in the Court of Appeals' opinion that this Petitioner must seek leave in the District Court to be heard on his assert "liens and claims" is plainly erroneous because:

(1) The last cited decision of this Court of Appeals (*Peckham* v. *Ronrico Corpn., et al.*, 211 F.2d 727) adjudges that his "lien and claim" was of a *character* entitling him to be heard as a matter of *right* (not of grace or discretion) and this operates as *res adjudicata* of that point, binding the District Court, Court of Appeals, and all the present Appellees-Respondents, all of whom were parties in said last cited appeal in person or by representation, as above shown.

(2) Apart from the point in the last paragraph (1), the District Court's said opinion in this proceeding plainly shows that this Petitioner's said written Objections were *treated* by the District Court as an application by him to

intervene, or as if he had intervened, in this Chapter X proceeding. This suffices to satisfy any supposed need for an *application* to intervene under Chapter X or under the Rules of Civil Procedure. The effect of the Court of Appeals' opinion on this point is more reactionary than the old common law pleading, contrary to all the spirit and letter of the Rules of Civil Procdure, the Judicial Code, and Chapter X.

Elaboration of Argument.

Factual Errors and Omissions in the Opinion Form Erroneous Premises for the Legal Proposition Decided.

The Motion to Dismiss the appeal (p. 6, *supra*) is misleading in its factual statements, inferences and omissions.

The short Court of Appeals "Per Curiam" opinion closely parallels and paraphrases several of these erroneous statements, inferences and omissions. (Compare Opinion in Appendix of this Petition, pp. 14a to 15a, *infra*).

Part of District Court's Opinion Demonstrating Factual Errors in Court of Appeals' Opinion.

That part of the District Court's Opinion relating to this appellant reads (our italics and emphasis):

> "*Another complicating factor* in the situation of the debtor was the proceeding commenced in this court in 1946 by one R. E. Peckham, (R E. Peckham, Assignee etc., plaintiff vs. Rourico Corporation et al., defendants, Civil Number 4639) who alleged that he was the assignee for the creditors of the Meyer-Kiser Bank, and contended in effect that the money which the Florida Cane Products Corporation had used originally *to acquire a one-half interest in Rourico Corporation* was money belonging to the creditors of the Meyer-Kiser Bank of Indianapolis.

"Subsequently, R. E. Peckham intervened in his original suit in another capacity, claiming to be the trustee holder of a judgment assigned to him from the Liquidation of the Meyer-Kiser Bank of Miami. In his intervention, Peckham made *an alternative attack upon a part of the shares of Ronrico* originally issued to Florida Cane Products Corporation, claiming in essence that the interest of Ferd S. Meyer in the Ferd S. Meyer Puerto Rican *Trust* (and hence his interest in common shares of Ronrico) should properly be applied to the payment of the judgment rendered against Meyer and in favor of the Meyer-Kiser Bank of Miami.

"The complaint in the original Peckham suit was filed on May 20, 1946, and the intervening claim was first filed on July 21, 1947, and again filed on March 9, 1949. For the purposes of this proceeding, the merits of the claims of Peckham in the companion litigation are not material. However, the *existence* of the Peckham litigation, and the *inability of the parties* to conclude it for a period of about 12 years, has left the debtor corporation in a difficult position, in that the *debtor* in its efforts to refinance itself, has *never been able to determine whether it should, or could, properly deal with Meyer* and his group as the *owners* of a substantial block of its stock.

"Under these circumstances, there was some *question* as to whether *any* plan of reorganization of the debtor could be devised which would be *feasible*, and which would at the same time be *fair* and *equitable* to *the interested parties*, and the court has given serious *consideration* as to whether it might not be to the best interests of the *stockholders* of the debtor, *including Peckham*, if the court should make use of the

discretionary powers which it has under the provisions of Section 326 (2) of the Bankruptcy Act to enter an order adjudging the debtor a bankrupt.

"The court has, however, *concluded* that an order adjudging the debtor a bankrupt would be contrary to the best interest of the creditors and stockholders, and that a plan of reorganization should be approved *if* one could be devised which would be fair, equitable, and feasible."

• • •

"On April 28, 1957, Distilling and Meyer entered into an agreement (herein called the "Meyer Agreement") under which Meyer and his group agreed to *sell*, and Distilling agreed to buy, the preferred and common stock held by Meyer and his group, for an aggregate price of $244,000, of which $99,000 *was assigned to the common shares*, and the remainder of $145,000 was assigned to the preferred shares. The agreement contains other provisions, among which is one providing that it is subject to the approval of this court.

"The Meyer Agreement, as written, *cannot* be approved as a *whole* by the court, since the Meyer Agreement *fails to take into consideration the claims of R. E. Peckham*, and contains other provisions which seem to invade the discretionary powers o fthe court. Insofar as the court is concerned, the Meyer Agreement *will* be accepted as stating a *value*, which the Meyer group and Distilling both accept, for the shares of preferred and common stock of the debtor now held by the Meyer group. The plan of reorganization which is now before the court *so provides*. • • •"

• • •

"In the opinion of the court, the plan, as drafted by the Trustee, affords adequate protection for the realization by the *Meyer* group of stockholders of *their equity* in the property of the debtor.

"The *interest* of R. E. Peckham *in* these proceedings presents a more difficult problem. It should be borne in mind that Peckham has presented himself to this court as a *trustee,* both for the creditors of the Meyer-Kiser Bank of Indianapolis, and, in his intervening claim, as Trustee holder of a judgment entered on behalf of the Liquidator of the Meyer-Kiser Bank of Miami against Fred S. Meyer, in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for the County of Dade. In a document filed herein entitled "Peckham's Response Concerning Sections 210 and 211", Jay E. Darlington, in his capacity as attorney for Peckham, has stated under oath that '*Peckham* does not have and never has had any *beneficial* interest in either of these judgment".

"It accordingly follows that Peckham is, and must be treated as, a *fiduciary,* and that this court, sitting as a court of equity, *must consider* and determine whether the proposed plan of reorganization *fairly and equitably deals with the beneficiaries of the two trusts,* and need not necessarily be swayed by the desires either of Peckham or of his counsel, *if* in the judgment of the court the *course* proposed by Peckham or his counsel would fail to give the beneficiaries of the two trusts at least as much protection for the realization by them of the value of *their* contingent equity, if any, in the property of the *debtor,* as is given to the Meyer group.

"There are a limited number of alternative available for the protection of the contingent equity, if any, of the beneficiaries of the two Peckham trusts.

"One alternative, which has been urged by counsel of Peckham, is the *dismissal* of these proceedings. On this point, there is an apparent conflict of interest between Peckham and his counsel and the *beneficiaries* of the two trusts. Mr. Darlington, Peckham's counsel, stated in the document entitled "Peckham's Response Concerning Section 210 and 211", that Darlington "was employed by a written contingent attorney fee contract between Peckham, assignee, and the affiant (Darlington), prior to the commencement of Civil No. 4639". It is obvious that a court of equity cannot give consideration to *such* an interest, but will rather seek the best interests of the ultimate *beneficiaries* of the Peckham trusts.

"It is apparent that a *dismissal* of the proceedings would be at best a *gambler's solution*, since the debtor corporation is now without working capital, and must depend (as it has depended for the last 10 years) upon Distilling if it is to survive at all. * * * (Our italics and emphasis).

Appellees' Record Appendix, pp. A 82-87.

The Court of Appeals' opinion appears to completely overlook—at least it completely ignores—the contents of the aforesaid District Court's Order of March 21, 1958, overruling Petitioner's objections (p. 5, supra), and the District Court's Opinion which we have quoted supra.

Incidentally, please observe the peculiar and unprecedented attitude of the District Court in the last paragraphs above quoted, to the effect that the Judge will take it upon himself to gratuitously *intervene* between this appellant Peckham and his counsel on the one hand, and the beneficiaries whom they represent on the other hand

under appointment of an *Indiana court* (171 F.2d 653 and 211 F.2d 727). The Judge himself gratuitously assumed the *role* of *trustee* and *counsel* for this appellant's bene- the latter's counsel as to the *merits* and *wisdom* of what they should do in this Chapter X proceeding,—though at the same time he was acting as Judge as between all the same time he was acting as Judge as between all the parties in the proceeding and was also acting as Judge in the trial then in progress in the above cited civil case.

Statutes and Cases Dealing with "Appealable Interest" and Right to Appeal.

Enlarged Jurisdiction of Courts of Appeals and Supreme Court in Bankruptcy Matters.

Present Statute.

"(a) The United States *court of appeals*, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, *are invested with appellate jurisdiction* from the several courts of bankruptcy in their respective jurisdictions *in proceedings in bankruptcy*, either *interlocutory or final*, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, *both* in matters of *law and in matters of fact*: Provided, however, that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, that when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"(b) Such appellate jurisdiction shall be *exercised by appeal* and in the *form and manner of an appeal*.

"(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. As amended May 27, 1926, c. 406, § 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat. 926; June 22, 1938, c. 575, §1, 52 Stat. 854; June 25, 1948, c. 646, § 32, 62 Stat. 991; July 7, 1952, c. 579, § 9, 66 Stat. 424." (Our emphasis).

11 U. S. C. 47

Former Statute.

"(a) The circuit courts of appeals of the United States, and the supreme courts of the Territories in vacation, in chambers and during their respective terms are invested with *appellate jurisdiction of controversies arising in bankruptcy proceedings* from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"(b) The several circuit courts of appeals shall have *jurisdiction in equity,* either interlocutory or final, to *superintend and revise* in matter *of law* the *proceedings* of the several inferior courts of bankruptcy within their jurisdiction. *Such power* shall be exercised on due notice and *petition* by any party aggrieved. * * * (July 1, 1898, c. 541, § 24, 30 Stat. 553; Feb. 13, 1925, c. 229, §§ 1, 5, 13, 43 Stat. 936, 937, 941." (Our emphasis).

11 U. S. C. 47. (Old).

Absolute Right of Appeal.

"Sec. 24, sub. a, of the Chandler Act, 52 Stat. 854, 11 U. S. C. § 47, 11 U. S. C. A. § 47, sub. a, gives the Circuit Courts of Appeals appellate *jurisdiction* from courts of bankruptcy 'in *proceedings in bankruptcy, either interlocutory or final*'. An order of the bankruptcy court vacating a restraining order against prosecution of a suit in a state court is, like a stay order itself, a *proceeding in bankruptcy.* • • • The amendments to § 24, sub. a, made by the Chandler Act *practically abolished the distinction* between appeals as of right and by leave. • • •". (Our emphasis).

Albin v. Cowing Pressure Relieving Joint Co., (1942) 317 U.S. 211, 212, 63 S. Ct. 170, 171; Reh. den. 317 U.S. 712, 63 S. Ct. 432.

"Section 206 of the Act provides that 'any creditor or stockholders of the debtor shall have the *right to be heard on all* matters arising *in* a proceeding under this chapter'; and the right to be *heard*, thus conferred, *includes the right to appeal. In re: Keystone Realty Holding Co.*, 3 Cir. 1941, 117 F.2d 1003, 1005, 133 A. L. R. 1378; *Dana* v. *S. E. C.*, 2 Cir., 1942, 125 F.2d 542.

"• • • These appellants were afforded ample opportunity to qualify themselves to *vote* on the plan. *But though they failed* to participate at *that* stage of the proceedings, it was proper for the district court, as it did here, to admit them to participation at the hearing on *confirmation* of the plan, having satisfied itself of the authenticity of their claims to be beneficial holders of stockholder interests.

"This brings us to a discussion of the *merits* of the appeal." (Our emphasis).

Horowitz v. Kaplan, (1 Cir. 1951) 193 F.2d 64, 66 Cert. den. 342 U.S. 946

An Interested Party has Right of Appeal from Illegal Plan, Notwithstand Lack of "Value" as Determined for Purpose of Reorganization.

"Finally, the appellants, (*second mortgage holders*) contend that the court erred in *finding* that two-thirds of the *first* mortgage bondholders had *assented* to the plan. *This* is a question which the appellants *may* raise *despite their lack of any equity in the property.* By subdivision (f) (3) of section 77B (1) U. S. C. A. § 207 (f) (3) acceptance as provided in subdivision (e) (1), U.S.C.A. § 207 (e) (1) is made a *condition precedent to confirmation* of the plan. In *Downtown Inv. Ass'n* v. *Boston Metropolitan Bldgs.*, 81 F. (2d) 314, 321 (C.C.A. 1), it is said that that compliance with subdivision (e) (1) is necessary 'before the court has jurisdiction to confirm a plan.' Whether it is truly jurisdictional we need not decide. Even if it be only a condition precedent to lawful confirmation, an order which confirms a plan *without the requisite consents* may be questioned by a second mortgagee, for *he cannot be deprived of his remedy of rocelosure* merely by proof that the first mortgage indebtedness is *greater* than the value of the property. *Unless* the *statute* takes the remedy away, he may insist upon it. Section 77B does take it away, but *only on condition;* therefore *he may insist that the condition be fulfilled.* • • • • " (Our emphasis).

In re: Witherbee Court Corporation (2 Cir. 1937) 88 F.2d 251, 254, cert. den. 301 U.S. 701, reh. den. 301 U.S. 715

Whether Appellant has an "Appealable Interest" goes to the Merits and was Erroneously Decided on Motion to Dismiss.

"Appellee seeks to *dismiss* this appeal *because*, it is said appellant has *no interest* in the subject-matter and is *not entitled* to appeal. *Whether* it has such an interest in *the issue* in the case. It *claimed* such interest in the circuit court, and *assigns error* here on the *finding* of that court that it has no such interest. The fact that this issue might be decided against it here *does not warrant the dismissal* of its appeal." (Our emphasis).

Department of Public Works etc. v. *Rockwell Cemetery Ass'n.*, (1924) 312 Ill. 232, 143 N.E. 875, 877

"A consideration of the questions raised by the motion to dismiss would *require the same examination* of the evidence offered as would a consideration of the appeal on its *merits*. Motion to dismiss appeals *are not looked upon with favor*." (Our emphasis).

Davis v. *F. W. Woolworth Co.*, (10 Cir. 1931) 54 F.2d 366

Public Interest that Review of this Abuse of Chapter X should not be Suppressed by the Court of Appeals' Technical Refusal to Review the Merits.

"* * * It was *its duty* to *dismiss the proceeding whenever* it appeared that a fair and equitable *plan was not feasible*, leaving the debtor to the alternative remedy of bankruptcy liquidation, see *Tennessee Publishing Co.* v. *American National Bank*, 299 U.S. 18, 22, 57 S. Ct. 85, 81 L. Ed. 13. And it has long been the practice of bankruptcy courts to *permit* creditors *or others not entitled* to file pleadings or otherwise contest the allegations of a petition *to move for the vacation of an adjudication or the dismissal of a petition* on grounds, whether strictly jurisdictional or not, *that the proceeding ought not to be allowed to proceed*." (Our emphasis).

Securities and Exchange Commission v. United States Realty & Improvement Co. (1940), 310 U.S. 434, 457-458, 60 S.Ct. 1044, 1054.

"*Unless* the District Judge finds that the plan has these *qualities*, he need go no further. Unless he so finds, *he has no authority to proceed.* There is no occasion for the District Judge to consider the constitutional validity of the application of the clauses of subsection (b) (5) if the debtor's proposal is not found to be 'fair' and 'feasible.'" (Our emphasis).

Tennessee Pub. Co. v. *American Nat. Bank* (1936) 299 U.S. 18, 22-23; 57 S. Ct. 85, 87.

"Where, as here, *the so-called plan* filed within the time limit set by the court is *not merely a defective* plan, *but is not a Chapter X plan at all*, we would be inclined to hold that, within the meaning of § 236, no plan has been proposed within the time fixed or extended by the judge, and therefore that *termination* of the chapter X proceedings is *mandatory*. We need not rest our decision on this ground, however.

"The present 'plan' as drafted has not been, and could not be, approved by the judge as an acceptable plan under chapter X. Nor should the judge grant further time for the filing of an amended plan if there is no immediate prospect that the debtor could devise an acceptable plan of reorganization, especially since over a *year and a half* has elapsed since the debtor filed its petition under chapter X. In that case, the proceedings under chapter X should be *terminated*. See *Lincoln Alliance Bank & Trust Co.* v. *Dye*, 2 Cir., 1940, 115 F.2d 234. Under §§ 141 and 146 of the Act, 52 Stat. 887, it is provided that the judge at the *outset* shall dismiss a petition by the debtor under chapter X, if satisfied that 'it is *unreasonable to expect* that a plan of reorganization can be effected.' If the petition *has* been approved, *and it later becomes evident* to the judge that there is no reasonable prospect of

effecting a plan of reorganization, it *then* becomes *his duto to terminate* the chapter X proceedings, pursuant to § 236, above quoted." (Our emphasis).

John Hancock Mut. Life Ins. Co. v. Casey, (1 Cir. 1944), 141 F.2d 104, 107; Cert. denied 323-713.

Dismissal of Appeal Violates Appellant's Rights Under the Fifth Amendment.

While ordinarily, the right of appeal is not guaranteed by the Fifth Amendment in Federal Courts or the Fourteenth Amendment in State Courts,—the "Due Process Clause" does forbid arbitrary discrimination or withholding of a right of appeal which Congress or the Legislature has granted:

"* * * While due process under the Fifth Amendment, as under the Fourteenth, does not require appellate review, nevertheless when Congress creates that right it is not free from all constitutional restrictions, including the obligation not to make unreasonable discriminations."

"* * * The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

Boykin v. Huff, (C.A., D.C., 1941) 121 F.2d 865, 872.

"Petitioner applied to the United States District Court, Northern District of California, Southern Division, for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings. * * * The District Court, without issuing

the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F. Supp. 600. The Court of Appeals affirmed the order of the District Court. 9 Cir., 221 F.2d 276. *The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment.* See *Mooney* v. *Holohan,* 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing."

Chessman v. Teets (1955) 350 U.S. 3, 76 S.Ct. 34.

Conclusion.

Wherefore the Petitioner prays that this Court may issue a Writ of Certiorari requiring said Court of Appeals to vacate its said judgment and opinion dismissing his appeal, and for all other just and proper relief in the premises.

Attorney for Petitioner
JAY E. DARLINGTON,

APPENDIX.

District Court's Opinion.

[Filed April 8, 1958.]

This is a proceeding under the provisions of Chapter X of the Bankruptcy Act, initiated by the debtor, Ronrico Corporation (hereinafter called "Ronrico") on April 6, 1956. On that same date, a Trustee was appointed by this court, and a hearing was set for May 18, 1956 to consider any relevant matters that might be brought to the attention of the court. At the hearing on May 18, 1956, no objections were made by any interested party, either to the order approving the petition of the debtor, to the appointment of the trustee, or to any other relevant matter.

The Trustee so appointed has continued to operate the business of the debtor, since his appointment, and up to the present time, relying principally upon a production and financing arrangement with Puerto Rico Distilling Company (hereinafter called "Distilling"), which was approved by the court.

The reasons which impelled the debtor to invoke the jurisdiction of this court under the provisions of Chapter X of the Bankruptcy Act are set forth at length in the debtor's petition, in which the debtor alleges in substance that it is unable to meet its obligations as they mature, and that it has been prevented by a conflict between its stockholders from obtaining additional risk capital which it urgently needs. The debtor had substantial earnings during the war years, between 1941 and 1946, and paid out approximately $2,600,000 in dividends and royalties to its stockholders during the period. In 1947 the market for the debtor's product collapsed, and debtor's sales of rum

in the market in Continental United States dropped from 239,024 cases in 1946 to 21,321 cases in 1947. As a result the debtor found itself heavily indebted to banks and others, without other means for payment except through a liquidation of its stocks of aged rum.

The stockholders of the debtor made various efforts to meet the situation, apparently in the hope that the difficulties in which the debtor found itself in 1947 would be temporary. In 1947, the debtor raised an additional $250,000 in capital by the issuance of its preferred stock for that amount to its stockholders.

The debtor's situation did not improve, and the additional capital provided by the preferred stock issue was insufficient to meet the debtor's problems. A second effort was made, late in 1947, to provide the debtor with further funds, in the form of a mortgage loan from Distilling in the amount of $100,000.00.

This also proved insufficient, and a third effort was made on July 14, 1948, when the two principal stockholders of the debtor (Puerto Rico Distilling Company and the Ferd S. Meyer Puerto Rican Trust) entered into an agreement (sometimes called the "Agreement of July 14, 1948"), by which Distilling undertook and agreed to make such loans to the debtor as the latter might require for a period of one year, but not in excess of $150,000.00. As security for the repayment of these loans, the debtor assigned to Distilling its trademarks and the business and good will of the business appurtenant thereto; and turned the management of its business and affairs over to an Executive Committee of the debtor's Board of Directors. Three members of the Executive Committee were nominees of Distilling and two, nominees of the Ferd S. Meyer Puerto Rican Trust.

The $150,000.00 originally provided in the Agreement of July 14, 1948 also proved insufficient for the debtor's needs, and without further formal agreement, Distilling continued its advances under the Agreement of July 14, 1948, until on April 6, 1956, the total amount owing by the debtor to Distilling by reason of loans and advances made under the Agreement aggregated $370,304.33.

A still further effort was made to solve the problems of the debtor on March 11, 1952, when Distilling purchased from the debtor its stocks of aged rum and the barrels containing the same for $530,111.31, which was in effect used to pay off the remaining balance owing by the debtor to the banks, and to reduce the indebtedness of the debtor to Distilling.

As was permitted under the Agreement of July 14, 1948, Distilling, as of September 1, 1952, took over the production and sale of the debtor's products, which it continued, except for a short period, up to the date of the appointment of the Trustee in this proceeding.

The debtor made one final effort to refinance itself at a meeting of its Board of Directors on January 18, 1956, at which the Board proposed, subject to approval of the stockholders, to accept an offer to Distilling to subscribe for not more than 44,500 shares of common stock of the debtor, at a price of $16.80 per share, upon condition, however, that Distilling should acquire not less than 35,000 shares of the new issue.

Ferd S. Meyer, as Trustee of the Ferd S. Meyer Puerto Rican Trust, countered this effort of the Board of Directors of the debtor by a stockholders' suit in the Chancery Court of Delaware; and as a result of the filing of this suit, Distilling withdrew its offer to purchase shares of

the debtor, and the Board of Directors of the debtor filed the debtor's petition which initiated this proceeding.

The debtor's efforts to refinance itself were further complicated by other factors. The debtor was conceived of initially as a sort of corporate partnership between Distilling and Florida Cane Products Corporation (later substituted by the Ferd S. Meyer Puerto Rican Trust), for the purpose of marketing the products of Distilling, principally rum under the trademark "Ronrico". Voting trust agreements were set up in which control of the debtor was shared equally by the two groups of stockholders, who were equally represented on the Board of Directors, and equally represented in management by two officers called co-chief executives. A second voting trust, known as the Ferd S. Meyer Puerto Rican Trust was created to hold the shares originally issued to Florida Cane Products Corporation. Although this latter voting trust expired in 1955, the trustee, Ferd S. Meyer, refused to assent to its termination.

Another complicating factor in the situation of the debtor was the proceeding commenced in this court in 1946 by one R. E. Peckham, (R.E. Peckham, Assignee etc., plaintiff vs. Ronrico Corporation et al., defendants, Civil Number 4639) who alleged that he was the assignee for the creditors of the Meyer-Kiser Bank, and contended in effect that the money which the Florida Cane Products Corporation had used originally to acquire a one-half interest in Ronrico Corporation was money belonging to the creditors of the Meyer-Kiser Bank of Indianapolis.

Subsequently, R. E. Peckham intervened in his original suit in another capacity, claiming to be the trustee holder of a judgment assigned to him from the Liquidation of the Meyer-Kiser Bank of Miami. In his intervention, Peck-

ham made an alternative attack upon a part of the shares of Ronrico originally issued to Florida Cane Products Corporation, claiming in essence that the interest of Ferd S. Meyer in the Ferd S. Meyer Puerto Rican Trust (and hence his interest in common shares of Ronrico) should properly be applied to the payment of the judgment rendered against Meyer and in favor of the Meyer-Kiser Bank of Miami.

The complaint in the original Peckham suit was filed on May 20, 1946, and the intervening claim was first filed on July 21, 1947, and again filed on March 9, 1949. For the purposes of this proceeding, the merits of the claims of Peckham in the companion litigation are not material. However, the existence of the Peckham litigation, and the inability of the parties to conclude it for a period of about 12 years, has left the debtor corporation in a difficult position, in that the debtor in its efforts to refinance itself, has never been able to determine whether it should, or could, properly deal with Meyer and his group as the owners of a substantial block of its stock.

Under these circumstances, there was some question as to whether any plan of reorganization of the debtor could be devised which would be feasible, and which would at the same time be fair and equitable to the interested parties, and the court has given serious consideration as to whether it might not be to the best interests of the stockholders of the debtor, including Peckham, if the court should make use of the discretionary powers which it has under the provisions of Section 236 (2) of the Bankruptcy Act to enter an order adjudging the debtor a bankrupt.

The court has, however, concluded that an order adjudging the debtor a bankrupt would be contrary to the best interest of the creditors and stockholders, and that a plan

of reorganization should be approved if one could be devised which would be fair, equitable, and feasible.

From the history of the debtor, from the report of the appraisers, and from the operations of the debtor's business by the Trustee, it is apparent that future profitable operations of the debtor's business is at best speculative. It is also apparent from these same sources that the debtor has no chance of subsisting alone, in the sense that the debtor has at all times since its inception relied upon Distilling for the production of its products and in other material ways. A separation of the debtor from Puerto Rico Distilling Company would seem to be impracticable from a business standpoint.

It would thus seem to follow that any plan of reorganization to be feasible, must provide for a continuance of the relationship between the debtor and its source of supply, namely, Puerto Rico Distilling Company. For other reasons, which will presently appear, the exact relationship between Distilling and a reorganized debtor, is a matter which should be left to the discretion of Distilling.

Because of the speculative nature of the debtor's business, it would seem that no plan of reorganization would be fair and equitable to the creditors and stockholders of the debtor other than Puerto Rico Distilling Company which would not provide for the payment of all creditors in full, and for the realization by such stockholders of the present value of their interests in the debtor. Similar reasoning applies to the interest of Distilling in the reorganized company. Neither this court, nor any other court, can by any plan of reorganization, give to Distilling anything more than a fair chance to recover its claims against the debtor, now amounting to more than $500,000. The balance sheet of the debtor, as of July 31, 1957, which

is contained in the report of the appraisers, shows a deficit in the stockholders' equity in the debtor of about $300,000, which has undoubtedly been increased since that time. The appraisers, by projecting assumed earnings over a period of years, have, for the purposes of their appraisal, eliminated ths deficit, and have come up with a stockholders' equity of $52,937. This is predicated, however, upon the integrated operation of the debtor, Distilling, and the distributor of the debtor's products. Such an integration is, of course, beyond the power of this court. The most that this court can do is to place the interested parties in such a position that they can effect such an integration if they see fit.

No question has been raised as to the desirability of paying all creditors, other than Puerto Rico Distilling Company, in full; and the plan which is now before the court for approval, expressly so provides.

On April 28, 1957, Distilling and Meyer entered into an agreement (herein called the "Meyer Agreement") under which Meyer and his group agreed to sell, and Distilling agreed to buy, the preferred and common stock held by Meyer and his group, for an aggregate price of $244,000, of which $99,000 was assigned to the common shares, and the remainder of $145,000 was assigned to the preferred shares. The agreement contains other provisions, among which is one providng that it is subject to the approval of this court.

The Meyer Agreement, as written, cannot be approved as a whole by the court, since the Meyer Agreement fails to take into consideration the claims of R. E. Peckham, and contains other provisions which seem to invade the discretionary powers of the court. Insofar as the court is concerned, the Meyer Agreement will be accepted as stat-

ing a value, which the Meyer group and Distilling both accept, for the shares of preferred and common stock of the debtor now held by the Meyer group. The plan of reorganization which is now before the court so provides. The Meyer agreement seems to have been reached by fair negotiation between the interested parties, and there appears to be no reason to disregard it. Failure to accept the valuation placed by Distilling and Meyer on the Meyer shares would leave the court with no recourse other than to turn to the valuation placed upon these same shares by the report of the appraisers, which would be distinctly disadvantageous to Meyer, and consequently to Peckham. The Meyer Agreement, by valuing the preferred and common shares now held by Meyer, in effect places a valuation of $590,000 upon the stockholders' equity in the debtor, while the report of the appraisers reaches a figure of $52,937.00.

The court will disregard so much of the Meyer Agreement as purports to dispose of the funds which will be deposited in this proceeding pursuant to the Meyer Agreement, to the extent that the interests of Peckham may be adversely affected thereby.

In the opinion of the court, the plan, as drafted by the Trustee, affords adequate protection for the realization by the Meyer group of stockholders of their equity in the property of the debtor.

The interest of R. E. Peckham in these proceedings presents a more difficult problem. It should be borne in mind that Peckham has presented himself to this court as a trustee, both for the creditors of the Meyer-Kiser Bank of Indianapolis, and, in his intervening claim, as Trustee holder of a judgment entered on behalf of the Liquidator of the Meyer-Kiser Bank of Miami against Ferd S. Meyer.

in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for the County of Dade. In a document filed herein entitled "Peckham's Response Concerning Sections 210 and 211", Jay E. Darlington, in his capacity as attorney for Peckham, has stated under oath that "Peckham does not have and never has had any beneficial interest in either of these judgments".

It accordingly follows that Peckham is, and must be treated as, a fiduciary, and that this court, sitting as a court of equity, must consider and determine whether the proposed plan of reorganization fairly and equitably deals with the beneficiaries of the two trusts, and need not necessarily be swayed by the desires either of Peckham or of his counsel, if in the judgment of the court the course proposed by Peckham or his counsel would fail to give the beneficiaries of the two trusts at least as much protection for the realization by them of the value of their contingent equity, if any, in the property of the debtor, as is given to the Meyer group.

There a limited number of alternative available for the protection of the contingent equity, if any, of the beneficiaries of the two Peckham trusts.

One alternative, which has been urged by counsel of Peckham, is the dismissal of these proceedings. On this point, there is an apparent conflict of interest between Peckham and his counsel and the beneficiaries of the two trusts. Mr. Darlington, Peckham's counsel, stated in the document entitled "Peckham's Response Concerning Section 210 and 211", that Darlington "was employed by a written contingent attorney fee contract between Peckham, assignee, and the affiant (Darlington), prior to the commencement of Civil No. 4639". It is obvious that a court of equity cannot give consideration to such an interest, but

will rather seek the best interests of the ultimate beneficiaries of the Peckham trusts.

It is apparent that a dismissal of the proceedings would be at best a gambler's solution, since the debtor corporation is now without working capital, and must depend (as it has depended for, the last 10 years) upon Distilling if it is to survive at all. Very substantial sums of money must be invested in the debtor if it is eventually to become profitable. In case of a dismissal, the court would have no power to assure itself that such sums of money would be invested, or to control in any way the form and manner of such investment, if any should be made.

Various avenues would be open to Puerto Rico Distilling Company if no plan of reorganization should be approved. The most obvious would be to insist upon an adjudication in bankruptcy under section 236 of the Bankruptcy Act. Another would be to supply the debtor corporation with funds by the purchase of common stock. Since it has been determined by the appraisal that the present common stock is without value, there would be no reason why Distilling should not in such case re-finance the debtor corporation so as to freeze out the minority interest upon which Peckham claims a lien.

An adjudication in bankruptcy would be ruinous, to all parties concerned. In view of the appraiser's report, the existing capital deficit and the resulting stoppage of business the estate would lose its going concern value, the properties would have to be sold at a fair upset price, the trademarks, trade name and good will, if any, would probably become worthless and in all probability, no equity would be available to the preferred and common stock, and, the Peckham beneficiaries would have nothing upon which to exercise their claimed equitable lien upon the

stock owned by the Meyer group in the debtor corporation.

There are probably other solutions which Distilling might find to the problem. It is quite obvious from the course of these proceedings that Distilling would not willingly continue as Peckham's partner in any enterprise. It is not necessary or feasible for the purposes of this opinion to speculate as to how such a relationship would be terminated. It is sufficient to say that a dismissal of these proceedings would not carry any assurance that the beneficiaries of the two Peckham trusts would receive anything out of the shares of stock of the debtor upon which they now claim a lien.

On the other hand, a dismissal of these proceedings would be distinctly unfair to Distilling. As is evidenced by the Trustee's report under Section 167 of the Bankruptcy Act, which was approved by order entered herein on May 3, 1957, the Trustee has found no evidence of fraud, mismanagement, misconduct, or irregularity in the conduct of the debtor's business by Distilling. If guilty of anything, Puerto Rico Distilling Company has been guilty of an excess of zeal in its efforts to keep the debtor afloat for the past 11 years. The history of the debtor indicates that Distilling would have been in a much more advantageous position if it had not attempted to support the debtor; and that the Meyer group, and consequently the Peckham beneficiaries, would have had nothing to litigate over if Distilling had withdrawn its financial support from the debtor in 1947, as it might have or if Distilling had awaited the report of the appraisers before making the Meyer Agreement.

Notwithstanding these facts, which should have been apparent both to Meyer and Peckham, both have asserted

claims of fraud, mismanagement, misconduct, and irregularity in the conduct of the business of the debtor by Distilling. Meyer in fact precipitated these proceedings by the commencement of an action in the Chancery Court in Delaware; and Peckham, through his counsel Parlington, and notwithstanding the report of the Trustee [illegible] Section 167 of the Bankruptcy Act, and the orde[illegible]f May 3, 1957 approving the Trustee's Report, has persistently reiterated the same charges.

There is nothing in the record in these proceedings, not anything in the report of the Trustee under Section 167, or otherwise presented to the court, which would indicate any ground for penalizing Distilling, or affording any ground which Distilling should not receive from these proceedings such opportunity as the court can give it, for the eventual realization of the substantial sums of money which Distilling has invested in, and must later invest in, the debtor, if it is to recover its present investment. Similarly, there is no reason why Distilling should in the future be menaced by suits and proceedings which can be fairly and equitably settled in these proceedings.

The same considerations which make a dismissal of these proceedings undesirable, are applicable to any plan of reorganization which would permit Peckham or the beneficiaries of the Peckham trusts to retain any interest in, or lien upon, the stock of the debtor. Any effort upon the part of Peckham to retain such an interest or lien in a plan of reorganization, is as much a gambler's solution of his problem, as would be a dismissal. The problem of financing the debtor's continuing business remains unchanged, and the interest of the Peckham beneficiaries would still remain subject to the risks of the business. If the business of the reorganized debtor should be success-

ful, and Peckham should succeed in establishing his claim to the shares, or any part of them, formerly belonging to the Meyer group, Peckham would in such event seem to have obtained a windfall. All risks of the reorganized corporation would be upon Distilling. Neither Peckham nor his beneficiaries would, or could, participate in the financing or the management of the reorganized corporation. Should the business of the reorganized corporation, so managed and financed, be unsuccessful, it is not improbable that Distilling would eventually be faced with a stockholder's suit by Peckham or his beneficiaries. Even an unsuccessful suit of this kind would be expensive, troublesome, and embarrassing to Distilling, and the risk of such an action would tend to hamper and hinder the rehabilitation of the debtor.

It is unlikely that Distilling would accept such a risk, and it would be unfair and inequitable to ask it to do so. It is the opinion of the Court that any plan of reorganization which would perpetuate, even in part, the situation which led to these proceedings, and which would subject Distilling to the risk of a repetition of the circumstances giving rise to these proceedings, would be unfair and inequitable, and in all likelihood, not feasible.

The court is accordingly of the opinion that the plan, as submitted by the Trustee, is fair, equitable and feasible and an order approving the same shall be entered.

San Juan, P. R., on this 8th day of April, 1958.

CLEMENTE RUIZ NAZARIO
United States District Judge

Court of Appeals' Opinion.

[November 21, 1958]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

PER CURIAM.

In protracted litigation R. E. Peckham as plaintiff and as an intervenor has been seeking for years and is still seeking to establish and enforce an equitable lien upon or claim to shares of stock in Ronrico Corporation, a corporation organized under the laws of Puerto Rico. For a description of the nature of his claims and of past phases of this protracted litgation see the opinions of this court in *Peckham* v. *Ronrico Corp.*, reported in 1948, 171 F.2d 653, and in 1954, 211 F.2d 727.

While this litigation remained pending and undetermined in the court below, the Ronrico Corporation on April 6, 1956, filed a voluntary petition in that court seeking reorganization under Chapter X of the Bankruptcy Act. Reorganization proceedings in the regular course followed which culminated eventually in orders classifying creditors and stockholders and confirming an amended plan of reorganization. Peckham was given notice of the various steps as taken in the reorganization proceedings and participated through his counsel in some of them. Now he has appealed from the District Court's order approving an amended plan of reorganization of the Ronrico Corporation and also from orders of that court granting the Trustee's petition for classification of creditors, granting Puerto Rico Distilling Company's petition to amend the plan as already amended, and confirming the plan as thus amended. The matter presently before us is Puerto Rico Distilling Company's motion as

holder of one half of the stock of Ronrico and as its principal creditor to dismiss Peckham's appeals on a number of grounds. We think it clear that the motion to dismiss must be granted for the reason, if for no other, that Peckham never became a party to the proceedings in the lower court.

Peckham is neither a creditor of Ronrico nor is he one of its stockholders. Thus he does not have "the right to be heard on all matters arising in a proceeding" for reorganization under Chapter X of the Bankruptcy Act conferred by § 206 of the Act. 11 U.S.C.A. § 606. Whatever right he might have to be heard in these proceedings, including the right to appeal, *Horowitz* v. *Kaplan*, 1 Cir., 1951, 193 F.2d 64, 66, certiorari denied 1952, 342 U.S. 946, 72 S.Ct. 561, 96 L.Ed. 704, can arise only under § 207 of the Act, 11 U.S.C.A. §607, which, insofar as relevant, provides: "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter." It is true that the referee, in the course of holding in the capacity of Special Master that Peckham could not be deemed a creditor of the debtor, recommended that Peckham be permitted to intervene in the Chapter X proceedings, if, indeed, he had not already been permitted to do so, "with respect to any proposal of the trustee concerning the stock on which [he] claims an equitable lien." But the fact remains that at no time in these proceedings has Peckham ever made any attempt to intervene by serving an appropriate motion in accordance with the procedure set out in Rule 24(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The fact that the court below allowed him to be heard and to participate in the proceedings by filing objections, being heard in argument etc. does not serve to make him a party. In re South State Street Bldg. Corp., 7 Cir., 1943, 140 F.2d

363, 366, certiorari denied sub nom. *Hofheimer* v. *Gold*, 1944, 322 U.S. 761, 64 S.Ct. 1279, 88 L.Ed. 1588. Nor do the privileges accorded to him in the court below give him the right to appeal as a party from any decree of that court. *Public Service Commission* v. *Philadelphia Rapid Transit Co.*, 3 Cir., 1935, 82 F.2d 481, 487, certiorari denied. *Citizens Passenger Railway Company of Philadelphia* v. *Public Service Commission*, 1936, 298 U.S. 673, 56 S.Ct. 938, 80 L.Ed. 1395.

An order will be entered dismissing these appeals.